Syarikat Uniweld Trading v The Asia Insurance Co Ltd

HIGH COURT (JOHORE BAHRU) — CIVIL APPEAL NO 11-65-1990
ABDUL MALIK ISHAK J
22 MARCH 1996

Insurance *— Construction of policy — Approach — Whether to take into account commercial object or function of clause*

Insurance *— Construction of policy — Exemption clause — Ambiguity — Whether to apply contra proferentum rule*

Insurance *— Contract of insurance — Formation of contract — Authorized agent of insurer — Filled proposal form for policyholder who was not conversant in English language — Imputed knowledge — Whether knowledge of agent deemed knowledge of insurer — Insurance Act 1963 s 44A*

Insurance *— Claims — Arbitration clause in insurance policy — Insured did not refer subject matter to arbitration — Whether insured had valid cause of action in civil court — Arbitration Act 1952 s 6*

The appellant ran a workshop repairing and welding motor vehicles. One day, the respondent's agent convinced the appellant to take out insurance for the workshop with the respondent. The agent filled the proposal form as the appellant was not conversant in English. On 5 October 1988, a policy of insurance was issued. During the currency of the policy, a fire broke out as a result of accidental leakage of a gasoline gas pipe causing the destruction of a motor car which exhaust was under repair. The appellant compensated the owner in the sum of RM9,000 for the total wreck, and sought indemnity from the respondent. The respondent relied on the exemption clause which excluded liability ' ... in respect of injury or damage caused by or in connection with or arising from fire ... ' although the policy expressly provided that the respondent would indemnify the appellant in respect of all sums which the appellant should become legally liable to pay for the compensation in respect of accidental damage to property belonging to third parties caused by the fault or negligence of the appellant or his employee. The appellant's business was clearly described in the policy as 'selling, fixing and welding exhaust, windscreen and radiator'. The agent knew that there was a possibility that the workshop might catch fire and it was common knowledge that the fixing or repairing of exhaust would involve welding. The magistrates' court dismissed the claim. The appellant appealed.

Held, allowing the appeal:

(1) An insurance policy should be construed in accordance with sound commercial principles and good business sense, so that its provisions receive a fair and sensible application (see p 177E);

Martin (John) of London v Russell [1960] 1 Lloyd's Rep 554 and *Lowenstein (J) & Co v Poplar Motor Transport (Lymm), Gooda (Third Party)* [1968] 2 Lloyd's Rep 223 followed.

(2) The literal meaning of the words in the insurance policy must not be allowed to prevail where it would produce an unrealistic and generally unanticipated result such as to absolve the respondent as an insurer from liability on the chief risks sought to be covered by the insurance policy (see p 167E–G); *M'Cowan v Baine & Johnston & Ors* [1891] AC 401; *Re Etherington and the Lancashire and Yorkshire Accident Insurance Co* [1909] 1 KB 591 and *Westminister Fire Office v Reliance Marine Insurance Co* (1903) TLR 668 followed.

(3) In interpreting any clause of an insurance policy, one must bear in mind the commercial object or function of the clause and its apparent relation to the contract as a whole. In adopting this approach, it becomes apparent that the literal meaning of the clause in the insurance policy must necessarily yield to business sense so that an ambiguity in the wording could be resolved (see p 167H–I); *Kearney v General Accident Fire and Life Assurance Corp* [1968] 2 Lloyd's Rep 240 and *L Schuler AG v Wickman Machine Tools Sales Ltd* [1974] AC 235 followed.

(4) It appeared that there was an ambiguity between the indemnity clause and the exemption clause, and applying the contra proferentum rule, the insurance policy should be construed in favour of the appellant insured (see p 171E); *Malaysia National Insurance Sdn Bhd v Abdul Aziz bin Mohamed Daud* [1979] 2 MLJ 29 followed.

(5) The agent was an authorized agent of the respondent insurer and whatever knowledge the agent had of the workshop, together with the knowledge that the appellant insured was not conversant in the English language, must be deemed to be knowledge of the respondent insurer (see p 176I); *Newsholme Brothers v Road Transport and General Insurance Co Ltd* [1929] 2 KB 356 and *Bawden v London Edinburgh and Glasgow Assurance Co* [1892] 2 QB 534 (CA) distinguished.

(6) The issue of agency and the implications of s 44A of the Insurance Act 1963 are matters outside the purview of the arbitrators. These are matters that should best be resolved by the courts — not the arbitrators; consequently, good grounds exist not to submit the dispute between the parties to arbitration and notwithstanding the arbitration clause in the insurance policy, the appellant insured was entitled to this action (see p 180F).

[Bahasa Malaysia summary

Perayu mengendalikan suatu bengkel membaiki dan mengimpal kenderaan motor. Pada suatu hari, ejen penentang telah meyakinkan perayu supaya mengambil insurans untuk bengkel dengan penentang.

Ejen itu telah mengisi borang cadangan oleh kerana perayu tidak fasih berbahasa Inggeris. Pada 5 Oktober 1988, satu polisi insurans telah dikeluarkan. Semasa kewujudan polisi itu, satu kebakaran telah terjadi akibat kebocoran paip gas gasolin menyebabkan pemusnahan sebuah kereta yang ekzosnya sedang dibaiki. Perayu telah memampasi pemunya dalam jumlah RM9,000 untuk keseluruhan ranap tersebut dan meminta tanggung rugi daripada penentang. Penentang bergantung kepada fasal pengecualian yang mengecualikan liabiliti '...berhubung dengan kecederaan atau kerugian yang disebabkan oleh atau berkaitan dengan atau akibat kebakaran ...' walaupun polisi itu jelas memperuntukkan bahawa penentang akan menanggung rugi perayu berhubung dengan semua jumlah yang perayu harus bertanggungjawab di sisi undang-undang untuk pampasan berkenaan dengan kerugian tidak sengaja harta yang dimiliki oleh pihak ketiga, yang disebabkan oleh kesilapan atau kecuaian perayu atau pekerjanya. Perniagaan perayu jelas disifatkan dalam polisi itu sebagai 'menjual, membaiki dan mengimpal ekzos, cermin depan dan penyinar'. Ejen tahu bahawa terdapat kemungkinan bengkel itu boleh terbakar, dan adalah pengetahuan umum bahawa pembaikan ekzos melibatkan pengimpalan. Mahkamah majistret menolak tuntutan. Perayu membuat rayuan.

Diputuskan, membenarkan rayuan itu:

(1) Suatu polisi insurans harus ditafsir menurut prinsip perdagangan yang mantap dan pertimbangan perniagaan yang adil supaya peruntukan-peruntukan yang dikandunginya terpakai secara adil dan wajar (lihat ms 177E); *Martin (John) of London v Russell* [1960] 1 Lloyd's Rep 554 dan *Lowenstein (J) & Co v Poplar Motor Transport (Lymm), Gooda (Third Party)* [1968] 2 Lloyd's Rep 223 diikut.

(2) Makna harfiah perkataan-perkataan dalam polisi insurans tidak harus dibenarkan jika ia akan menghasilkan satu kesan yang tidak realistik dan kesan yang tidak boleh dijangka pada amnya, yang akan membebaskan penentang sebagai penanggung insurans daripada liabilitinya terhadap risiko utama yang ingin dilindungi oleh polisi insurans (lihat ms 167E–G); *M'Cowan v Baine & Johnston & Ors* [1891] AC 401; *Re Etherington and the Lancashire and Yorkshire Accident Insurance Co* [1909] 1 KB 591 dan *Westminister Fire Office v Reliance Marine Insurance Co* (1903) TLR 668 diikut.

(3) Dalam pentafsiran sebarang fasal polisi insurans, seseorang harus mengingati tujuan atau fungsi perdagangan fasal itu dan kaitannya kepada kontrak secara keseluruhan. Dengan menerima-pakai pendekatan ini, adalah jelas bahawa makna harfiah fasal dalam polisi insurans mesti menyerah kepada sikap adil urusniaga agar satu ketaksaan dalam susunan kata boleh diselesaikan (lihat ms 167H–I); *Kearney v General Accident Fire and Life Assurance*

Corp [1968] 2 Lloyd's Rep 240 dan *L Schuler AG v Wickman Machine Tools Sales Ltd* [1974] AC 235 diikut.

(4) Nampaknya, terdapat suatu ketaksaan antara fasal tanggung rugi dan fasal pengecualian, dan dengan memakai rukun contra proferentum, polisi insurans harus ditafsirkan dengan memihak kepada pengambil insurans perayu (lihat ms 171E); *Malaysia National Insurance Sdn Bhd v Abdul Aziz bin Mohamed Daud* [1979] 2 MLJ 29 diikut.

(5) Ejen yang berkenaan merupakan seorang ejen yang diberikuasa oleh penanggung insurans penentang dan apa-apa pengetahuan yang dipunyai oleh ejen mengenai bengkel itu, bersama dengan pengetahuan bahawa pengambil insurans perayu tidak fasih berbahasa Inggeris, mesti dianggap sebagai pengetahuan pengambil insurans penentang (lihat ms 176I); *Newsholme Brothers v Road Transport and General Insurance Co Ltd* [1929] 2 KB 356 dan *Bawden v London Edinburgh & Glasgow Assurance Co* [1892] 2 QB 534 (CA) dibeza.

(6) Isu ejensi dan implikasi s 44A Akta Insurans 1963 merupakan perkara di luar skop penimbangtara. Ini merupakan perkara yang wajar diselesaikan oleh mahkamah — bukan penimbangtara; dengan demikian, alasan baik wujud untuk tidak menyerah pertikaian antara pihak-pihak kepada timbangtara dan meskipun terdapat fasal timbangtara dalam polisi insurans, pengambil insurans perayu adalah berhak kepada tindakan ini (lihat ms 180F).]

Notes

For cases on contract of insurance, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 26–29.

For cases on construction of policy, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 20–25.

For cases on arbitration clauses, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 15–16.

Cases referred to

Alagappa Chettiar v Palanivelpillai & Ors [1967] 1 MLJ 208

Amanah Saham Pahang Bhd v Maran Road Sawmill Sdn Bhd & Ors [1984] 1 CLJ 242

Bawden v London Edinburgh & Glasgow Assurance Co [1892] 2 QB 534

Canning v Farquhar (1885–1886) 16 QBD 727

Central Lorry Service Co Sdn Bhd v The American Insurance Co [1981] 2 MLJ 40

Chan Woon-Hung (t/a Ocean Plastic Factory) v Associated Bankers Insurance Co Ltd (1993) 2 HKLR 127

China Insurance Co Ltd v Ngau Ah Kau [1972] 1 MLJ 52

Cornish v The Accident Insurance Co Ltd (1889) 23 QBD 453

'Dong Moon' Trans Asia Shipping Co Ltd, The v 'Dong Moon' Owners & Ors [1979] 1 MLJ 152
Etherington and the Lancashire and Yorkshire Accident Insurance Co, Re [1909] 1 KB 591
Filliter v Phippard (1847) 11 QB 347
Fraser v Furman (BN) (Productions), Miller Smith & Partners (A Firm) Third Party [1967] 3 All ER 57
Harrington v Pearl Life Assurance Co Ltd (1914) 30 TLR 613
Hydarnes SS Co v Indemnity Mutual Marine Assurance Co [1895] 1 QB 500
Ives & Barker v Willans [1894] 2 Ch 478
Kandasami v Mohamed Mustafa [1983] 2 MLJ 85
Kearney v General Accident Fire and Life Assurance Corp [1968] 2 Lloyd's Rep 240
Lai Siew Wah Sdn Bhd v Ng Chin [1988] 1 MLJ 393
Lan You Timber Co v United General Insurance Co Ltd [1968] 1 MLJ 181
L Schuler AG v Wickman Machine Tool Sales Ltd [1974] AC 235
Lochgelly Iron and Coal Co Ltd v M'Mullan [1934] AC 1
Lowenstein (J) & Co v Poplar Motor Transport (Lymm), Gooda (Third Party) [1968] 2 Lloyds' Rep 233
Malaysia Government Officers' Cooperative Housing Society Ltd v United Asia Investment Ltd & Ors [1972] 1 MLJ 113
Malaysia National Insurance Sdn Bhd v Abdul Aziz bin Mohamed Daud [1979] 2 MLJ 29
M'Cowan v Baine & Johnston & Ors [1891] AC 401
Martin (John) of London v Russell [1960] 1 Lloyd's Rep 554
National Insurance Co Ltd v S Joseph [1973] 2 MLJ 195
Newacres Sdn Bhd v Sri Alam Sdn Bhd [1991] 3 MLJ 474
Newsholme Brothers v Road Transport and General Insurance Co Ltd [1929] 2 KB 356
Ong Eng Chai v China Insurance Co Ltd [1974] 1 MLJ 82
Perbadanan Kemajuan Negeri Perak v Asean Security Paper Mill Sdn Bhd [1991] 3 MLJ 309
Potts or Riddell v Reid [1943] AC 1
Tan Kang Hua v Safety Insurance Co [1973] 1 MLJ 6
Thiagarajah Pooinpatarsan v Shanmugam Paramsothy & Ors [1990] 2 CLJ 312
United Malayan Insurance Co Ltd v Lee Yoon Heng [1964] MLJ 453
Vaughan v Menlove (1837) 3 Bing NC 468
Westminster Fire Office v Reliance Marine Insurance Co (1903) 19 TLR 668
Willesford v Watson (1873) 8 Ch App 473
Wong Lang Hung v National Employees' Mutual General Insurance Association Ltd [1972] 2 MLJ 191
Wooding v Monmouthshire and South Wales Mutual Indemnity Society Ltd [1939] 4 All ER 570
Yager & Guardian Assurance Co, Re (1912) 108 LT 38

Legislation referred to

Arbitration Act 1952 s 6
Insurance Act 1963 s 18E, 44A(2), (3)(a)

Brian Komathi (Brian Komathi & Partners) for the appellant.
Wong Heng Khong (HK Wong & Partners) for the respondent.

Abdul Malik Ishak J: The facts which gave rise to the present appeal may be briefly stated thus. The appellant is Ng Kong Kong and he runs a workshop-styled Syarikat Uniweld Trading. That workshop was engaged, at the material time, in repairing and welding motor vehicles. Since Ng Kong Kong is the owner of Syarikat Uniweld Trading, for the purpose of this appeal, any reference to the appellant must necessarily refer to Ng Kong Kong. Now, one day, the respondent's agent went to see the appellant at the workshop and managed to convince the appellant to take out insurance for the workshop with the respondent. There was evidence that the appellant was not conversant with the English language and consequently, the agent filled the form for the appellant. In due course, a policy of insurance vide No 80–462717–88 dated 5 October 1988 was issued to the appellant in the workshop's name. During the currency of the insurance policy, to be precise on 28 January 1989 at about 11.30am, while the appellant's servant was engaged in repairing a motor car bearing registration no JE 46 belonging to one Liaw Khoon Liang ('Liaw'), a fire broke out and destroyed the motor car completely as a result of an accidental leakage of a gasoline gas pipe. The appellant compensated Liaw in the sum of RM9,000 for the total wreck of the motor car and sought indemnity from the respondent. Since the respondent refused to indemnify the appellant, the matter went for trial before the learned magistrate, Magistrates' Court, Johor Bahru. The learned magistrate gave judgment for the respondent, and hence this appeal.

Only two issues were canvassed before me, namely:

(1) whether the appellant's loss was excluded by the exception clause in the insurance policy; and

(2) whether the arbitration clause in the insurance policy barred the appellant from instituting the action against the respondent.

The first issue

It is germane, at this juncture, to look into the exception clause relevant to the present appeal. For this, I need to quote in extenso the relevant portions of the insurance policy and it is set out in printed form as follows:

Exceptions

Unless otherwise specially stated herein or endorsed hereon the indemnity expressed in this Policy shall not apply to or include:

(4) Liability in respect of injury or damage caused by or in connection with or arising from:

...

(b) Fire earthquake explosion flood fumes or water pollution.

The indemnity expressed in the insurance policy is clearly set out in the schedule thereto and it is worded in printed form as follows:

> The Indemnity: The Company will indemnify the Insured in respect of:
>
> A All sums which the Insured shall become legally liable to pay for compensation in respect of.

Immediately below this, the following words are typed therein:

> Accidental personal bodily injury to third parties and accidental damage to property belonging to third parties caused by:
>
> (a) the fault or negligence of the Insured and/or any person in the Insured's service whilst engaged in the Insured's business as above described.
>
> (b) any defect in the ways, works, machinery, plant or premises of the Insured at the business premises address.

Two things must be highlighted here. Firstly, the premium was paid by the appellant as confirmed by the agent in examination-in-chief. Secondly, the insurance policy had been issued to the appellant, and consequently, there was a binding contract of insurance between the appellant and the respondent. But, one must not forget that there is no rule of insurance law that there can be no binding contract of insurance until the premium has been actually paid or the policy has been issued: *Wooding v Monmouthshire and South Wales Mutual Indemnity Society Ltd* [1939] 4 All ER 570 at p 581 and *Re Yager & Guardian Assurance Co* (1912) 108 LT 38 at p 44. What is important is to see whether the terms of the insurance have been agreed upon by the parties and if that has been achieved, then there is a prima facie binding contract of insurance, and the insured is obliged to pay a premium as agreed, while the insurer must deliver a policy containing the agreed terms. The respondent here, as a responsible insurer, negotiated on what I term as a commercially sensible basis when they incorporated a condition that the insurance shall not commence until the premium has been actually paid to and accepted by the respondent and further until the respondent's official letter or policy has been issued: see condition 1 of the insurance policy and two cases on the subject matter, namely: *Canning v Farquhar* (1885–1886) 16 QBD 727 and *Harrington v Pearl Life Assurance Co Ltd* (1914) 30 TLR 613.

Now, having found that there was indeed a valid and subsisting contract of insurance between the appellant and the respondent, the next step to consider would be the role of the agent in securing the policy for the respondent. From the available evidence, it was the agent that approached the appellant to secure an insurance policy for the respondent. The agent acted for the respondent and the agent visited the workshop and saw what was the business conducted by the appellant. The agent testified that he filled the form with care and wrote the type of business undertaken by the appellant. Indeed, the schedule to the insurance policy clearly mentioned the appellant's business to be 'selling, fixing and welding

exhaust, windscreen and radiator.' The agent knew that there was a possibility that the workshop might catch fire. The agent was told by the appellant that the purpose of the insurance coverage was to protect owners of motor vehicles who sent their motor vehicles to the workshop from losses. Liaw's car was sent to the workshop to have its exhaust repaired. It is common knowledge that to fix an exhaust or to repair an exhaust to the undercarriage of a motor car, welding must be done. Welding involved a risk of fire to the workshop and damage to the property of Liaw, the third party, and the agent must have known about this when he filled the form on behalf of the appellant who was, to all intents and purposes, unable to understand the English language. The form was in the English language and so was the insurance policy. It is not wrong to say that in the Malaysian context, Malaysians generally, when approached by an insurance agent, would regard that agent as an agent of the insurer. The Malaysian public would expect the insurance agents to fill the forms for them and consequently, would be under the impression that the insurance agents have an express authority to complete the contract on behalf of the insurers. It is for this reason that an insurance policy, like the one before me now, should be construed in accordance with sound commercial principles and good business sense, so that its provisions receive a fair and sensible application: *Martin (John) of London v Russell* [1960] 1 Lloyd's Rep 554 at p 565; *Lowenstein (J) & Co v Poplar Motor Transport (Lymm), Gooda (Third Party)* [1968] 2 Lloyds' Rep 233 at p 238. The literal meaning of the words in the insurance policy must not be allowed to prevail where it would produce an unrealistic and generally unanticipated result as envisaged in *M'Cowan v Baine & Johnston & Ors* [1891] AC 401 at p 403; *Re Etherington and the Lancashire and Yorkshire Accident Insurance Co* [1909] 1 KB 591 at p 597; and *Westminster Fire Office v Reliance Marine Insurance Co* (1903) 19 TLR 668. An unanticipated result in the context of the present appeal would be to absolve the respondent as an insurer from liability on the chief risks sought to be covered by the insurance policy. Thus, in an insurance policy where the main purpose was to insure against damages arising from negligent acts by the insured, it was held that a condition that 'the insured shall take reasonable precautions' could not be so construed that every negligent act was a breach of it (*Fraser v Furman (BN) (Productions), Miller Smith & Partners (A Firm) Third Party* [1967] 3 All ER 57; and *Cornish v The Accident Insurance Co Ltd* (1889) 23 QBD 453). It is not out of place to mention that in interpreting any clause of an insurance policy, one must bear in mind the commercial object or function of the clause and its apparent relation to the contract as a whole (*Kearney v General Accident Fire and Life Assurance Corp* [1968] 2 Lloyd's Rep 240; and *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235 at pp 251 and 265). In adopting this approach, it becomes apparent that the literal meaning of the clause in the insurance policy must necessarily yield to business sense so that an ambiguity in the wording can be resolved.

It was submitted by counsel for the respondent that whatever knowledge the agent had in regard to the workshop, that knowledge cannot be imputed to the insurer. Reliance was placed on the authority of

Newsholme Brothers v Road Transport and General Insurance Co Ltd [1929] 2 KB 356 for that proposition. The facts in *Newsholme* were that: a proposal form for the insurance of a motor bus was signed by the person wishing to effect the insurance, but the answers to the questions therein, which were warranted to be true and to form the basis of the contract, were filled in by the insurance company's agent who, although told the true facts, wrote, for some unexplained reason, answers which were untrue in a material respect. The agent was not authorized by the insurance company to fill in proposal forms, and it did not appear that the company knew that he had in fact done so. His duties were to procure persons to effect insurances and to see, as far as he could, that proposal forms were correctly filled up; he was not authorized to give a cover note or to enter into a policy of insurance. A policy was issued to the person who had signed the proposal form, and during its currency he made a claim under it, but the insurance company repudiated liability on the ground of the untrue statements in the proposal form. It was held by the Court of Appeal that the agent of the insurance company in filling in the proposal form was merely the amanuensis of the proposer, that the knowledge of the true facts by the agent could not be imputed to the insurance company, and therefore, the insurance company was entitled to repudiate liability on the ground of the untrue statements in the proposal form.

It is interesting to note that Rowlatt J, who heard the case of *Newsholme* at the court of first instance, held that Willey was the agent of the applicants in filling up the proposal, and that the arbitrator was wrong when he held that Willey's knowledge was the knowledge of the respondents. He accordingly held that as the answers written on the proposal form were incorrect in a material respect, the respondents were not liable under the policy. The applicants appealed. Out of the three judges of the Court of Appeal who heard the appeal, two of them wrote separate judgments with one writing a short concurring judgment. To be precise, both Scrutton LJ and Greer LJ wrote fairly long judgments with Russell LJ writing that short concurring judgment.

Now, Scrutton LJ began his judgment in *Newsholme* by adopting the stand (at p 362) that:

> The contract of insurance requires the utmost good faith; the insurer knows nothing; the assured knows everything about the risk he wants to insure and he must disclose to the insurer every fact material to the risk.

Further down the same page, Scrutton LJ said:

> The proposal form contains a promise, a warranty, that the truth of the proposer's answers shall be the basis of the contract, and is signed by the proposer. It is inevitable in such a course of business that the agent employed to get proposals will sometimes fill in or assist in filling in the answers on the form, and if they are inaccurate, the proposer, though he has signed the promise that those answers are true, alleges that the fault is that of the agent of the insurance company who filled in the answers, and claims, not that he can rescind the contract, but that he can rely on it without being prejudiced by the inaccuracy of the answers he has signed as true. There then comes a

> conflict, which is visible in the authorities cited to us, between the desire to hold the insurer, who employs an agent to bring him business, liable for anything that agent does in procuring business, and, on the other hand, the contention that a man who signs a promise that certain written statements are true and the basis of his contract, which statements, if he read them before signing, he would know to be untrue, cannot claim to vary his contract by omitting that promise and misstatement. The insurance companies also run the risk of the contention that matters they do not ask questions about are not material, for, if they were, they would ask questions about them.

Even though Willey, the insurance agent, was told the true facts by Newsholme, and he wrote down the untrue facts in the proposal form, yet Scrutton LJ held that Willey was the agent of Newsholme and consequently, as Newsholme had signed the proposal, he must be taken to have promised the truth of what he signed. This was how Scrutton LJ put it (at pp 364–365):

> The arbitrator finds that the answers were in the handwriting of Willey, the insurance agent, and that Newsholme apparently left the matter entirely in the hands of Willey. He finds that Willey was told the true facts by Newsholme, and that the reason for his not writing down the true facts did not appear. It must be either: (i) that he unintentionally wrote untruths, because (a) he did not understand Newsholme's communication to him, or (b) forgot what he was told, or (c) did not understand the questions asked; or (ii) that he intentionally wrote down untrue facts to earn his commission. Whichever alternative is the truth, Willey was writing the answers as the amanuensis of Newsholme, whose answers they were to be; and after Willey had written the answers, Newsholme signed the proposal, and must be taken to have promised the truth of what he signed. I do not understand how in receiving the information as to the answers and in writing those answers, Willey can be taken to be anything else than the agent of the person whose answers they are to be, and he must be taken to have written them and promised they were true. I can understand a contention that Newsholme was induced to sign by the representation of Willey, that these answers were what the insurance company required, though such a contention would be difficult to sustain in view of Newsholme's knowledge that the answers were untrue; but the result of such a contention, if sustained, would be rescission of the contract, not its enforcement with the omission of the untrue answers.

Scrutton LJ rejected Lord Esher MR's decision in *Bawden v London Edinburgh & Glasgow Assurance Co* [1892] 2 QB 534 (CA) when his Lordship wrote the decision in *Newsholme*. Lord Esher MR in *Bawden*'s case held the view that the agent was the agent of the insurer and the knowledge that the agent possessed was deemed to be the knowledge of the company. The facts in *Bawden*'s case were as follows: Bawden was an illiterate man, almost unable to read or write, but able to write his name. He had only one eye. Quin was a local agent of the insurance company. No evidence was given as to the extent of his authority, but the court 'gathered from what he did' that he had no authority to make contracts, but that he had authority to negotiate and settle the form of the assured's proposal for insurance, and he was supplied with forms for that purpose. Lord Esher

MR used the phrase 'negotiate and settle the terms of the proposal', whereas Lindley LJ said that: 'He was the person deputed by the company to receive the proposal, and to put it into shape.' Kay LJ, on the other hand, said: 'It was his duty to get the form of proposal filled up and signed by the proposer, and to see that this was done correctly.' However, it is not clear on what evidence the learned Lords Justices came to this finding. The proposal form contained a number of questions, the answers to which were filled in by Quin at the dictation of Bawden, and these answers were all correct. It also contained a printed declaration, the material words of which were:

> I ... have no physical infirmity, nor are there any circumstances that render me peculiarly liable to accidents ... I agree that the statements contained in this proposal shall form the basis of the contract between me and the company.

It also contained a marginal note against this clause: 'If not strictly applicable, particulars of any deviation must be given at back'. No particulars as to his one-eyed condition were given at back by either Quin or the assured, but Bawden signed his name to the proposal, and Quin forwarded it to the company who accepted it. Quin knew, at the time he did so, that Bawden had only one eye. The policy was renewed from time to time, and Bawden met with an accident which destroyed the sight of the remaining eye. The court held that Quin's knowledge was the knowledge of the company, who must, therefore, be taken to have contracted with a man who, to their knowledge, was a one-eyed man. The policy insured £500 'if the direct effect of (the injury by accident) shall, within three calendar months from the occurrence of such injury, occasion ... permanent total disablement,' eg 'irrecoverable loss of sight in both eyes'; and £250 if it caused complete and irrecoverable loss of sight in one eye. The court gave the plaintiff £500, though it is difficult to see how the accident within three months caused loss of sight in both eyes; the loss of sight in one eye had been caused long before the accident. The court held that the knowledge of the agent was the knowledge of the company and that the company, therefore, could not rely on the declaration of the assured that he had no physical infirmity, and that this was the basis of the contract.

On the facts, the present appeal can easily be distinguished from *Newsholme* and *Bawden*. In *Newsholme,* the insurance agent was told the true facts by Newsholme but the insurance agent saw it fit to fill the proposal form incorrectly and Newsholme eventually signed the proposal form. In *Bawden*, the insurance agent knew that Bawden was an illiterate, unable to read and write but only able to write his name and had only one eye. At the dictation of Bawden, the insurance agent filled the proposal form which did not reveal that Bawden was already blind in one eye.

In the present appeal, there was evidence that the agent attended an insurance seminar in Singapore in 1988 to polish up his knowledge in the field of insurance particularly in the field of public liability insurance. The agent was quite emphatic when he said: 'Saya ada beritahu pihak menuntut yang polisi itu akan lindungi kebakaran.' Then again, the agent continued in no uncertain terms that '... niat plaintif untuk lindungi dari api.'

A The manager of the respondent's company under cross-examination testified that:

> Saya tahu jenis kerja yang dilakukan di tempat plaintif seperti dalam D11. Saya tahu yang 'welding' ada guna gas dan api. Saya tahu kerja-kerja dibuat di tempat plaintif itu. Saya setuju yang tempat kerja plaintiff ada risiko kebakaran.

B It was with this knowledge that the manager accepted the appellant's form and thereafter issued the cover note. It is my judgment that the agent in the present appeal was the agent of the respondent insurer and any knowledge that the agent possessed was deemed to be the knowledge of the respondent insurer.

C Next, it was argued that the indemnity clause in the schedule does not extend to fire, that fire is exempted and if the appellant wanted an indemnity to extend to fire, he should have requested for it and by necessary implication, would have paid the premium on it. This was the stand of the respondent. The question to pose is: is it not due to the fault D or negligence of the appellant's worker whilst welding the exhaust of Liaw's motor car that the fire was sparked off due to an accidental leakage of a gasoline gas pipe? The obvious answer would be a resounding 'yes'. It appears that there is an ambiguity between the indemnity clause and exception (4)(b) and applying the contra proferentum rule as propounded by the Federal Court in the case of *Malaysia National Insurance Sdn Bhd v* E *Abdul Aziz bin Mohamed Daud* [1979] 2 MLJ 29, the insurance policy here should be construed in favour of the appellant insured. The Federal Court in *Malaysia National Insurance Sdn Bhd* pointed out that the general rules of interpretation apply to insurance policies as in any other written document and proceeded to lay down a well-trodden principle (at p 32) that:

F

> ... as between the assured and the insurers, the exception clause in the proviso, on the ordinary principles of construction has, as far as possible, to be read against the insurance company, that is to say, if there is a doubt as to its extent and the question were to arise as to the liability of the insurers, the construction most favourable to the assured must be given to him...

G Lord Brightman in the Privy Council case of *Kandasami v Mohamed Mustafa* [1983] 2 MLJ 85, especially at p 88, succinctly said that:

> ... there is a principle of construction that if a document inter partes contains an ambiguity which cannot otherwise be satisfactorily resolved, it is to be construed adversely to the party who proffered it for execution.

H In 1981, Mohamed Azmi J (now FCJ) applied the contra proferentum rule in construing an insurance policy in the case of *Central Lorry Service Co Sdn Bhd v The American Insurance Co* [1981] 2 MLJ 40. The plaintiffs in that case were the carriers of goods and they transported goods belonging to Nestle's Products (M) Ltd in their lorry, no BAC 7779. On 18 January I 1973 during the currency of the policy issued by the defendants to the plaintiffs to cover loan and damage to goods, an accident occurred to the said lorry while it was conveying the said goods from Kuala Lumpur to Muar. Near Malim in Malacca, the near side wooden flap suddenly gave way and some goods to the value of RM14,451.01 were thrown out from

the lorry and subsequently stolen by person or persons unknown. The amount claimed was admitted by the defendants subject to liability. The only issue for determination was whether the circumstances under which the goods were lost and damaged were covered by the inland and transport clause of the policy. It was held, inter alia, that in construing insurance policies, the contra proferentum rule should apply if there was ambiguity or doubt as to the extent of the policy. Since the policy was prepared by the insurance company, the doubt and ambiguity should be construed in favour of the insured, the plaintiffs in this case. Mohamed Azmi J (now FCJ), after examining the facts, observed in trenchant terms (at the same page):

> In my view, there is only doubt and ambiguity in the clause as to whether the policy covers any accident to the vehicle or is merely confined to accidents caused by the vehicle involuntarily leaving the road or by breakdown of bridges. In construing insurance policies, the contra proferentum rule should apply if there is ambiguity or doubt as to the extent of the policy. Since the policy is prepared by the insurance company, the doubt and ambiguity should be construed in favour of the insured, namely, the plaintiff in this case. In the event, I hold that the policy covers all accidents to the vehicle and that the two events described in the clause are mere examples and not exhaustive. The plaintiff's claim is, therefore, covered by the inland transport clause in the policy.

Any damage to property belonging to third parties which arose from the negligence of the appellant as the insured and/or the negligence of the appellant's servant whilst engaged in the workshop must be indemnified by the respondent insurer, so said the indemnity clause in the schedule. In construing the type of negligence which the indemnity clause is said to cover one must always bear in mind the type of business the appellant insured was engaged in, namely: selling, fixing and welding exhaust, windscreen and radiator. Since welding an exhaust of a motor vehicle involves some risk of fire, can the negligence, as referred to in the indemnity clause as set out in the schedule thereto, extend to fire? The appellant took the stand that it could, while the respondent adopted an opposite view. An act is said to be negligent when it is done, not with the desire of producing a particular result, but actually producing that result by carelessness or indifference. An illustration of this mental indifference is seen in the case of *Vaughan v Menlove* (1837) 3 Bing NC 468, where the defendant there stacked his hay in such a way as to give rise to the probability of fire. He was warned of the danger, was advised to take the rick down but he said that he would chance it. As a result the rick caught fire, which was due to his negligence and not to the defendant's intention at all that it should occur. Another illustration to the use of the word negligence to describe a state of mind is to be found in the judgment of Lord Denman CJ in *Filliter v Phippard* (1847) 11 QB 347 at p 357 where his Lordship in dealing with the way in which a fire may be started, said:

> In strictness the word 'accidental' may be employed in contradistinction to 'wilful' and so the same fire might begin both accidentally and be the result of negligence. But it may equally mean a fire produced by mere chance or incapable of being traced to any cause.

A In the present appeal before me, we know how the fire had been caused. It was caused by the negligence of the appellant insured's employee when welding the exhaust of Liaw's car. The way the fire was started in the present appeal reflected the carelessness or indifference of the appellant insured's employee. Lord Wright said in *Lochgelly Iron and Coal Co Ltd v* B *M'Mullan* [1934] AC 1 at p 25:

> In strict legal analysis, negligence means more than heedless or careless conduct, whether in omission or commission: it properly connotes the complex concept of duty, breach, and damage thereby suffered by the person to whom the duty was owing ...

C Per Lord Porter in *Potts or Riddell v Reid* [1943] AC 1 at p 31:

> ... negligence is the failure to use the requisite amount of care required by the law in the case where a duty to use care exists.

Now, applying 'the complex concept of duty, breach, and damage', the negligence of the appellant insured's employee was the proximate cause of D the fire that totally destroyed Liaw's car, the innocent third party. The appellant insured intended to insure his workshop from the hazards of fire and this was known to the agent. If there was an ambiguity as to whether the negligence that was referred to in the indemnity clause must necessarily extend to fire, as the appellant insured must have thought, then the contra E proferentum rule must be vigorously applied against the respondent insurer. This I so hold and it is part and parcel of my judgment.

Reverting back to the issue of agency, I would have thought that the appellant insured in the present appeal must be envious of the appellant in the case of *Chan Woon-Hung (t/a Ocean Plastic Factory) v Associated* F *Bankers Insurance Co Ltd* (1993) 2 HKLR 127, who had an interpretation in Chinese characters of the English language insurance policy on the insurance policy itself. In *Chan Woon-Hung*'s case, the Privy Council had to consider the extent to which the fact that the insured is illiterate is relevant to the insured's position as far as the contract of insurance was concerned. The brief facts of *Chan Woon-Hung*'s case were that the appellant G there was a Chinese resident in Hong Kong. He spoke no English and was the proprietor of a small plastic factory. In July 1990, he effected a policy of employer's liability insurance with the respondent, and subsequent thereto he renewed the policy annually for a number of years and received on each occasion a new policy with the same condition. Each policy was written in the English language and entitled 'Employees' Compensation H Policy'. Immediately above these words were words written in Chinese characters which provided a similar description. The policies contained ten conditions, and underneath, there was a box which contained the following words in the English language:

I > For your own protection, you are requested to read the policy and its conditions in order to ascertain that it is in accordance with your intentions and, if it is incorrect, return it immediately for alteration.

Now, within that box and immediately below the English words as set out above were Chinese characters which spelled out a similar message. Each

policy had a note written in Chinese characters headed 'Procedure for handling employee's compensation claim'. A

An accident occurred on 10 October 1983, where an employee of the appellant sustained an injury to his right hand while operating a pressing machine. The appellant quickly sent to the respondent's agents a notice of the accident and dutifully complied with all the other procedural B requirements in the Chinese note. But unfortunately, the appellant failed to inform either the agents or the respondent of his subsequent plea of guilty to the statutory offence of failing to provide an effective guard for dangerous machinery. The respondent took steps to repudiate the contract for non-disclosure and subsequently, they did just that. An argument was advanced by the appellant to the effect that the respondent, knowing that C the appellant did not understand the English language had, by attaching the note in Chinese characters to the policy, misled him into thinking that it contained exhaustive instructions as to what he must do in the event of a claim by an employee. Their Lordships of the Privy Council were of the view that the fact that the appellant had, in his possession, for a prolonged D period (three years to be exact) all the contract documents at his disposal and that he could at any time obtained a translation was said to negative any disability from which he suffered by his lack of understanding of the English language and accordingly, judgment was given to the respondent. Their Lordships of the Privy Council were also of the view that it must always be a question of circumstances as to what extent, if at all, ignorance E of the language of a contract is relevant to the position of one of the parties to the insurance contract.

In the present appeal before me, hardly three months (to be exact two months 23 days) after the appellant insured his workshop, the accidental damage to Liaw's car occurred at the workshop. Can I apply *Chan Woon-Hung*'s case and rule that the appellant could reasonably obtain a translation F of the English policy within that short period of hardly three months, even though the agent knew that the appellant wanted to insure his workshop from the hazards of fire? On the facts, the present appeal is poles apart from *Chan Woon-Hung*'s case. One sharp dissimilarity is that in the present appeal, there is no note in Chinese characters written in the insurance G policy for the benefit of the appellant insured — a Chinese by race. Lest I be accused of an oversight, I am mindful that Malaysian judges have dearly and rigidly held onto the rule, somewhat steadfastly, that once a person signs a proposal form he is bound by its contents (*United Malayan Insurance Co Ltd v Lee Yoon Heng* [1964] MLJ 453; *Wong Lang Hung v National* H *Employees' Mutual General Insurance Association Ltd* [1972] 2 MLJ 191; *China Insurance Co Ltd v Ngau Ah Kau* [1972] 1 MLJ 52; *Tan Kang Hua v Safety Insurance Co* [1973] 1 MLJ 6; *National Insurance Co Ltd v S Joseph* [1973] 2 MLJ 195 and *Ong Eng Chai v China Insurance Co Ltd* [1974] 1 MLJ 82). This seems to be the position in Malaysia, notwithstanding the I situation where the proposal was in the English language and the insured could neither read, write nor understand the language (*United Malayan Insurance Co Ltd v Lee Yoon Heng*). In England, English judges are more sympathetic towards the insured, as can be seen in the decision of *Bawden*'s

case. In my view, one of the factors that justified the decision in *Bawden*'s case was the fact that the insured in that case was a one-eyed man. The Court of Appeal in *Bawden*'s case took into account the surrounding circumstances so as to put a special meaning to the words used in the contract of insurance. In *Bawden*'s case, the surrounding circumstances were that, for fear of repetition, the proposal was negotiated and settled by the agent with a one-eyed man. Thus, in a situation where the proposer or insured is blind or illiterate, the agent can be said to have implied or ostensible authority to fill up the proposal form.

Section 18E of the Insurance Act 1963, which was introduced by an amending Act 294 wef 1 June 1975, watered down the *Newsholme* situation to a little extent.

That section reads as follows:

> 18E (1) Where any agent or servant of an insurer writes or fills in any particulars in a proposal for a home-service policy with the insurer, then, notwithstanding any agreement to the contrary between the proposer and the insurer, any policy issued in pursuance of the proposal shall not be avoided by reason only of any incorrect or untrue statement contained in any such particulars so written or filled in unless the incorrect or untrue statement was in fact made by the proposer to the agent or servant for the purposes of the proposal.
>
> (2) The burden of proving that any such statement was so made shall lie upon the insurer.
>
> (3) Nothing in this section shall be deemed to allow the avoidance of any policy for any reason or in any circumstances for or in which the policy could not have been avoided apart from the provisions of this section.

Now, s 18E of the Insurance Act 1963 relates and is confined to agents filling in proposal forms for a home-service policy. The First Schedule to the Insurance Act 1963 defines a home-service policy as:

> ... a life policy in respect of which premiums are contracted to be paid at intervals of less than two months and are or have been ordinarily collected in the course of door-to-door collections made by persons employed for the purpose, but shall not include in relation to any insurer any description of policy which the Director-General directs is not to be treated as a home-service policy.

Another apparent laxity in s 18E of the Insurance Act 1963 relates to the possible line of argument by the insurer to the effect that the agent has no authority to fill in the proposal form on behalf of the insurer. With these shortcomings, it is not surprising that by an amending Act 432 that came into effect on 1 April 1978, s 44A to the Insurance Act 1963 was enacted. That section reads as follow:

> 44A (1) A person who has at any time been authorised as its agent by an insurer and who solicits or negotiates a contract of insurance in such capacity shall in every such instance be deemed for the purpose of the formation of the contract to be the agent of the

insurer and the knowledge of such person relating to any matter relevant to the acceptance of the risk by the insurer shall be deemed to be the knowledge of the insurer.

(2) Any statement made or any act done by any such person in his representative capacity shall be deemed, for the purpose of the formation of the contract, to be a statement made or act done by the insurer notwithstanding any contravention of section 16A or any other provision of this Act by such person.

(3) This section shall not apply —

(a) where there is collusion or connivance between such person and the proposer in the formation of the contract; or

(b) where such person has ceased being its agent and the insurer has taken all reasonable steps to inform or bring to the knowledge of potential policy owners and the public in general the fact of such cessation.

At first glance, one is certainly impressed with the provisions of s 44A of the Insurance Act 1963. It is worded better and wider than s 18E, and the pertinent differences can be categorized in this way:

(i) s 18E speaks of 'agent or servant of the insurer', whereas s 44A mentions 'any person who has at any time been authorized as its agent by an insurer' and such person is deemed to be the agent of the insurer for the purpose of the formation of the contract.

(ii) s 18E is confined to a home-service policy, whereas s 44A applies to all types of insurance policies.

(iii) s 18E talks of an agent filling in the proposal form whereas s 44A is couched in wider terms in that it speaks of an 'agent ... who solicits or negotiates a contract of insurance ... '. It appears s 44A would throw the net wider; it would envisage the situation where the authorized agent solicits or negotiates and then extend to the point of time when the authorized agent fills up the proposal form. The whole rigmarole before filling up the proposal form would be, and should be, considered under s 44A.

(iv) *Newsholme* lays down the proposition that the agent who helps the insured to fill up the proposal form is not the agent of the insurer, instead the agent assumes the capacity of an agent for the insured. Section 44A, on the other hand, deems the knowledge of the agent to be that of the insurer and it covers matters like the agent's knowledge of material facts, as well as those other facts made relevant for the formation of the contract.

(v) By virtue of s 44A(2), the insurers will have to monitor their agents closely.

From the available evidence, I hold that by virtue of s 44A of the Insurance Act 1963, the agent in the present appeal was an authorized agent of the respondent insurer and whatever knowledge the authorized agent had on the workshop, together with the knowledge that the appellant insured was not conversant in the English language, must be deemed to be the knowledge

of the respondent insurer. Flowing from this, it is my judgment that there was a valid and binding contract of insurance between the appellant insured and the respondent insurer and, consequently, I hold, and it is my judgment, that the appellant insured should succeed in this appeal. It is obvious that the learned magistrate failed to adequately take into account that the agent was an authorized agent of the respondent insurer and whatever knowledge the authorized agent had must be deemed to be the knowledge of the respondent insurer by reference to s 44A of the Insurance Act 1963. Perhaps this oversight by the learned magistrate can be explained in that before him, s 44A of the Insurance Act 1963 was not adverted to at all. In fact, before me no arguments were advanced on ss 18E and 44A of the Insurance Act 1963. Be that as it may, in construing s 44A of the Insurance Act 1963, I am prepared to hold that an authorized agent of the insurer who solicits or negotiates a contract of insurance in such capacity for the formation of the contract must be given a wide scope of jurisdiction so as to cover not only explicit and expressed authority but also apparent or ostensible authority. Thus, if the insured allows an authorized agent to fill the proposal form for him, and the insured given the correct answers but the answers were falsely written down by the authorized agent for reasons best known to him, then the authorized agent remains throughout as the authorized agent of the insurer. This interpretation is in accord with the accepted canon of construction that a commercial document, like an insurance policy, should be construed in accordance with sound commercial principles and good business sense, so that the provisions of the insurance policy receive a fair and sensible application: *Hydarnes SS Co v Indemnity Mutual Marine Assurance Co* [1895] 1 QB 500 at p 504. But if the insured allows or requests the authorized agent to fill the proposal form for him and gives permission, whether oral or in writing, to the authorized agent to cough up with the answers to not only some but all the questions in the proposal form, the insured shall be deemed to have acquiesced in the falsification of the answers if he signs the proposal form. This is then said to be collusion or connivance between the authorized agent and the insured as envisaged in s 44A(3)(a) of the Insurance Act 1963. For these reasons, the first issue will have to be decided in favour of the appellant insured in that his loss was not excluded by the exception clause in the insurance policy.

The second issue

There was an arbitration clause in the insurance policy. The respondent insurer raised the arbitration clause in their statement of defence and before me, it was contended that since the subject matter was not referred to arbitration, the appellant insured was said to be without a valid cause of action. When both parties appeared before the learned magistrate on 2 December 1989, the statement of defence was filed and the court then proceeded to fix the date for hearing on 14 April 1990. Section 6 of the Arbitration Act 1952 allows any party to the legal proceedings to apply to the court to stay the proceedings pending reference to arbitration. It must be emphasized that the power to stay under s 6 of the Arbitration Act 1952

is discretionary in nature and that discretion must be exercised fairly and judiciously (*Willesford v Watson* (1873) 8 Ch App 473 and *Thiagarajah Pooinpatarsan v Shanmugam Paramsothy & Ors* [1990] 2 CLJ 312). From the authorities, certain conditions must be fulfilled before the court can exercise its discretionary power to order a stay of legal proceedings pending arbitration, and these conditions may be itemized and summarized in this way:

(1) a valid and binding arbitration agreement must subsist between the parties;

(2) the proceedings which the parties contemplated must have commenced in the courts;

(3) these proceedings must necessarily be instituted by one of the parties to the arbitration agreement or for that matter by any person claiming under that arbitration agreement;

(4) the proceedings must relate to and connect with those matters which have been agreed to be arbitrated upon by the parties;

(5) the party affected by the arbitration clause and who is a party to the legal proceedings must apply for a stay pending reference to arbitration;

(6) such an application for a stay has to be made before filing the cause of action in court or before taking any step towards commencing the legal proceedings (*Newacres Sdn Bhd v Sri Alam Sdn Bhd* [1991] 3 MLJ 474; *Ives & Barker v Willans* [1894] 2 Ch 478);

(7) the applicant is ever ready and willing in all situations to do all things considered necessary to despatch the proper conduct of the arbitration (*Amanah Saham Pahang Bhd v Maran Road Sawmill Sdn Bhd & Ors* [1984] 1 CLJ 242); and

(8) there is no sufficient reason shown as to why the matter should not be referred to arbitration in accordance with the arbitration agreement (*Perbadanan Kemajuan Negeri Perak v Asean Security Paper Mill Sdn Bhd* [1991] 3 MLJ 309).

From the record of proceedings, neither the appellant insured nor the respondent insurer applied under s 6 of the Arbitration Act 1952 to stay the legal proceedings that was filed before the learned magistrate pending reference to arbitration. I am sure had there been an application for a stay, the court would readily grant that stay pending arbitration, as reflected in *The 'Dong Moon' Trans Asia Shipping Co Ltd v 'Dong Moon' Owners & Ors* [1979] 1 MLJ 152. Of course, one must remember that it is always upon the person opposing the stay to give sufficient grounds why the dispute should not be referred to arbitration (*Alagappa Chettiar v Palanivelpillai & Ors* [1967] 1 MLJ 208). Raja Azlan Shah J (as he then was) put it nicely in the case of *Lan You Timber Co v United General Insurance Co Ltd* [1968] 1 MLJ 181 to this effect (at p 182):

> ... under s 5 of the Arbitration Ordinance [in substance the same as section 4 of the English Arbitration Act 1889] ... the court must hold the parties to

A their contract, provided they submit to arbitration, unless some sufficient reason, adequate in the circumstances, justifies its setting aside the terms of the contract and then exercising a discretion in favour of allowing the action to proceed. The onus is on the person opposing the stay, in this case the plaintiffs, and they had not shown sufficient reasons why it should not be referred to arbitration.

B Abdul Hamid J (who later became the Lord President) in *Malaysia Government Officers' Cooperative Housing Society Ltd v United Asia Investment Ltd & Ors* [1972] 1 MLJ 113 adopted the correct view when he said that the court is vested with the power to stay proceedings pending arbitration. He expressed in cogent terms the following (at p 114 right hand column C at G):

> The court is invested with the power to stay the proceedings if it is satisfied that there is sufficient reason that the matter should be referred to arbitration provided the applicant was, at the time when the proceedings were commenced, and still remains ready and willing to do all things necessary to D the proper conduct of the arbitration.

At p 115 of the same case, Abdul Hamid J said:

> I am conscious that in law the decision lies with the discretion of the court. However, this discretion must be founded upon judicial principles (see *Barnes v Youngs* [1898] 1 Ch 414 at p 418 (per Romer J); *Green v Howell* E [1910] 1 Ch 495 at p 511 (per Buckley LJ). It is for the Court to consider whether the questions at issue are such as would be better decided by the court than by an arbitrator. In doing so the court will have regard to all the circumstances of the particular case (see *Bristol Corp v John Aird & Co* [1913] AC 241).
>
> F As between the plaintiff and the first defendant, I am inclined to think that the arbitrator has jurisdiction to make an award if accounting and other differences arising directly under the agreement are the only matters in issue. That does not seem to be the case here. The matters in issue in the present case may involve not only a decision as to whether the first defendant company was a trustee of the plaintiff but also a question of fraud. Moreover G the plaintiff is also claiming against two other defendants, and the deponent/third defendant, evidently, is not only a director and shareholder of the first defendant company but also of the second defendant company. If, as alleged by the plaintiff, the money held by the first defendant company were indeed held in trust for the plaintiff and that a fraud or an act in the nature of fraud was perpetrated with intent to benefit the third defendant, then H clearly by reason of the third defendant's position in these companies, the questions of accounting, breaches of trust and fraud become quite inseparable. Should the matter be submitted to arbitration in accordance with the provisions of the agreement and an award be made against the first defendant company then clearly such award cannot be binding upon and enforced against the second and third defendants. Thus in so far as the I plaintiff's claim against the second and third defendants, the matter will still have to be decided by the court.

In another para of the same page, Abdul Hamid J continued:

> Having regard to the circumstances of this particular case and in the light of the pleadings and the affidavits before this court, I am satisfied that one of the substantial matters at issue is the question of the perpetration of fraud or something in the nature of fraud on the part of the first defendant company, a matter which it would seem to me to be outside the arbitrator's power to decide. In my view, this is not the type of dispute that should be properly referred to an arbitrator. In other words, I am satisfied that good grounds exist why this particular dispute should not be submitted to an arbitrator. I therefore refuse the application to stay proceedings to refer to arbitration.

In 1988 in the case of *Lai Siew Wah Sdn Bhd v Ng Chin* [1988] 1 MLJ 393, Wan Suleiman SCJ (as he then was), speaking for the (then) Supreme Court, refused an application for a stay pending arbitration when there was a bona fide allegation of fraud. This was what his Lordship said (at p 394):

> The respondent had relied on *Radford v Hair & Ors* [1971] 2 All ER 1089 and *Malaysia Government Officers' Co-operative Society Ltd v United Asia Investment Ltd & Ors* [1972] 1 MLJ 113 as authorities for the proposition that once the court is satisfied that one of the substantial matters at issue is an allegation of fraud on the part of a party (in the latter case, of the defendant), it could refuse an application by such a party for stay of proceedings.

Now, applying the above-mentioned authorities to the facts of the present appeal, it is my judgment that the issue of agency and the implications of s 44A of the Insurance Act 1963 are matters outside the purview of the arbitrators. These are matters that should best be resolved by the courts and not the arbitrators and consequently, I am impelled to conclude that good grounds exist not to submit the dispute between the parties to arbitration and notwithstanding the arbitration clause in the insurance policy, the appellant insured was entitled to institute his action in the Magistrates' Court, Johor Bahru. In the event, this issue falls to be decided in favour of the appellant insured.

For the reasons adumbrated above, I had no choice but to allow the appeal with costs. Consequently, I ordered that the appellant insured was entitled to the sum of RM9,000 which he had paid to Liaw and which sum represented the damage to the motor car. The adjuster's report at RM234, together with the police report at RM10, was ordered to be paid to the appellant insured. Lastly, an interest at 8% per annum from 6 March 1989 to the date of payment or realization was also ordered.

Appeal allowed.

Reported by Ringo KL Low